

MARTHA C. LUEMERS, ESQ. (State Bar No. 104658)  
DORSEY & WHITNEY LLP  
1717 Embarcadero Road  
Palo Alto, CA 94303  
Telephone: (650) 857-1717  
Facsimile: (650) 857-1288  
efilingPA@dorsey.com

BRUCE R. EWING (pro hac vice)  
DORSEY & WHITNEY LLP  
250 Park Avenue  
New York, New York 10177  
Telephone: (212) 415-9200  
Facsimile: (212) 953-7201

Attorneys for Defendants  
Children's Apparel Network, Ltd. and  
Mervyn's LLC

IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF CALIFORNIA  
SAN FRANCISCO DIVISION

GYM-MARK, INC. and THE GYMBOREE  
CORPORATION,

Plaintiffs,

v.

CHILDREN'S APPAREL NETWORK, LTD. and  
MERVYN'S LLC,

Defendants

CASE NO: C-07-3523 (EDL)

**ANSWER**

Defendants Children's Apparel Network, Ltd. and Mervyn's LLC, by and through the undersigned counsel, as and for their Answer to the July 6, 2007 complaint (the "Complaint") of plaintiffs Gym-Mark, Inc. and The Gymboree Corporation, hereby state as follows:

1. Defendants deny knowledge and information sufficient to form a belief as to the truth or falsity of the allegations contained in paragraphs 1 and 2 of the Complaint.

2. Defendants admit the allegations contained in paragraphs 3 and 4 of the Complaint except to the extent paragraph 4 characterizes certain goods as "infringing," which allegation is denied.

3. In response to the allegations contained in paragraph 5 of the Complaint, Defendants admit

1 that this Court possesses subject matter jurisdiction over the claims contained in the Complaint for  
2 copyright infringement and unfair competition and denies that such claims are properly stated and that  
3 Defendants are liable on such claims.

4 4. In response to the allegations contained in paragraphs 6 and 7 of the Complaint,  
5 Defendants admit that they are subject to personal jurisdiction in this District and deny the remaining  
6 allegations contained in these paragraphs.

7 5. Defendants admit the allegations contained in paragraph 8 of the Complaint.

8 6. Paragraph 9 of the Complaint contains a statement of law that Defendants neither admit  
9 nor deny.

10 7. In response to the allegations contained in paragraph 10 of the Complaint, Defendants  
11 admit that plaintiff Gym-Mark, Inc. is listed as the claimant on the copyright registration appended to the  
12 Complaint as Exhibit A, and that the work in which copyright is claimed is depicted in such registration.  
13 Defendants deny the validity of such registration, the originality of the work depicted in the registration  
14 and the remaining allegations contained in this paragraph.

15 8. Defendants deny knowledge and information sufficient to form a belief as to the truth or  
16 falsity of the allegations contained in paragraph 11 of the Complaint.

17 9. In response to the allegations contained in paragraph 12 of the Complaint, Defendants  
18 admit that Mervyn's LLC has sold items of children's apparel manufactured by defendant Children's  
19 Apparel Network, Ltd. under the trademark YOUNG HEARTS bearing various embroidery patterns, deny  
20 knowledge and information sufficient to form a belief as to the truth or falsity of the allegations as to  
21 when plaintiffs became aware of such sales and the alleged distinctions in the price points at which the  
22 parties' respective goods were sold. Defendants deny the remaining allegations contained in this  
23 paragraph.

24 10. Defendants deny the allegations contained in paragraphs 13 through 16 of the Complaint  
25 except for the allegation in paragraph 16 that defendants compete directly with plaintiffs, which allegation  
26 is admitted.

27 11. In response to paragraph 17 of the Complaint, Defendants repeat and re-allege their  
28 responses to paragraphs 1 through 16 of the Complaint as if fully set forth herein.

12. Defendants deny the allegations contained in paragraphs 18 through 24 of the Complaint.

13. In response to paragraph 25 of the Complaint, Defendants repeat and re-allege their responses to paragraphs 1 through 16 of the Complaint as if fully set forth herein.

14. Paragraph 26 of the Complaint contains a statement of law that Defendants neither admit nor deny.

15. Defendants admit the allegations contained in paragraph 27 of the Complaint.

16. Defendants deny the allegations contained in paragraphs 28 through 31 of the Complaint.

### **AFFIRMATIVE DEFENSES**

#### **First Affirmative Defense**

1. The Complaint fails to state a claim upon which relief may be granted.

#### **Second Affirmative Defense**

2. Plaintiffs' copyright registration Vau682-370 is invalid because it was issued in violation of 37 C.F.R. § 202.3(b)(4)(i)(B).

#### **Third Affirmative Defense**

3. Plaintiffs' copyright registration Vau682-370 is invalid because it materially misstates the nature of the work at issue.

#### **Fourth Affirmative Defense**

4. Plaintiffs' copyright registration Vau682-370 is invalid because the work at issue is not original.

#### **Fifth Affirmative Defense**

5. Plaintiffs' second claim for unfair competition under Cal. Bus. & Prof. Code §§ 17200 *et seq.* is preempted by the U.S. Copyright Act, 17 U.S.C. 101 *et seq.*

### **PRAYER FOR RELIEF**

WHEREFORE, Defendants Children's Apparel Network, Ltd. and Mervyn's LLC pray for the following relief against plaintiffs Gym-Mark, Inc. and The Gymboree Corporation, as follows:

1. For judgment in favor of the Defendants against the Plaintiffs on each claim contained in the Complaint;

2. For Defendants' reasonable attorneys' fees and costs pursuant to 17 U.S.C. § 505; and

Dated: August 22, 2007

By /s/  
MARTHA C. LUEMERS  
BRUCE R. EWING (pro hac vice)  
Attorneys for Defendants.  
CHILDREN'S APPAREL NETWORK, LTD. AND  
MERVYN'S LLC

